CASPER DRAFT
RESOURCE MANAGEMENT PLAN AND
ENVIRONMENTAL IMPACT STATEMENT

APPENDIX A

Split-Estate Lands

Appendix A
Split-Estate Lands

OVERVIEW

In Wyoming, the Bureau of Land Management (BLM) manages approximately 11.6-million acres of federal minerals under private surface (referred to as split-estate lands), of which, approximately 2.8-million acres lie within the Casper planning area. The majority of this split-estate land was patented under the Stock Raising Homestead Act (SRHA) of December 29, 1916, as amended, (43 United States Code [U.S.C.] § 299).

By the late 1800s, much of the public domain lands had been transferred to private ownership either by sale or by homesteading. The 1882 annual report from the General Land Office pointed out that during the 1800s, companies had fraudulently acquired great quantities of valuable coal and other lands. In response to this and subsequent investigations, President Theodore Roosevelt, in 1906, withdrew more than 66-million acres of coal lands from settlement and location. Congress questioned whether the President had authority to do this. In 1910, Congress passed the General Withdrawal or Pickett Act, giving the President power to "temporarily" withdraw public lands from settlement and location for public purposes.

In response to the uproar that this created among politicians, business people, and homesteaders, President Roosevelt signed the Act of March 3, 1909 (30 U.S.C. § 81), which allowed homesteaders who had settled coal lands to patent those lands, as long as the coal was reserved to the United States. The Act of June 22, 1910 (30 U.S.C. § 83), permitted homesteaders to file for coal lands, as long as the coal was reserved to the United States.

The mineral policies were extended to reserving portions or, in most cases, the full mineral estate to the United States by the Act of July 17, 1914 (30 U.S.C. § 121, 122). That Act opened lands that were withdrawn or classified for phosphate, nitrate, potash, oil, gas, or asphalt minerals, or allowed those deposits entry under the appropriate Homestead Acts (HA). Finally, the SRHA reserved all minerals to the United States.

As part of the mineral policies initiated during his Presidency, Theodore Roosevelt had advocated a leasing policy for coal and petroleum lands, but Congress resisted the idea. In 1917, potassium deposits could be leased with the enactment of the Potash Leasing Act, which passed because potassium was essential to America's production of military explosives during World War I. After numerous proposals and much heated debate in Congress, the Mineral Leasing Act (30 U.S.C.§ 181 et seq.) was adopted in 1920 and extended leasing to coal, petroleum, natural gas, sodium, phosphate, oil shale, and gilsonite. Under the appropriate provisions and authorities of the Mineral Leasing Act, individuals and companies could prospect for and develop the minerals associated with the Act.

Discussed in this appendix is what authority the BLM has to condition and regulate federally authorized leases, specifically oil and gas, on split-estate lands and the policy and guidance used to accomplish this.

The BLM is mandated by the Federal Land Policy and Management Act (FLPMA) of 1976, Section 202, to develop, maintain, and revise land use plans on public lands, where appropriate, using and observing the principles of multiple use and sustained yield. Section 103(e) of the FLPMA defines public lands as any lands and interest in lands owned by the United States. The mineral estate is an interest owned by the

United States. The BLM has an obligation to address this interest in their planning documents (43 CFR 1601.0-7(b); Bureau Manual 1601.09).

The FLPMA is intrinsically tied to the mandate provided by the National Environmental Policy Act (NEPA) of 1969. Specifically, Section 102 of NEPA states, "Congress authorizes and directs the federal government and its agencies to use a systematic interdisciplinary approach which insures the integrated use of the natural and social sciences and the design arts in planning and decisionmaking where man has an impact on man's environment." This theme is also present in Section 202(c)(2) of the FLPMA where, as with NEPA, it recognizes that management of the public lands and resources and the consequences associated with their use or consumption are tied to biologic, ecologic, social, and economic boundaries, not merely surface boundaries.

Through the years, from the planning stage through development of the mineral estate, two areas of concern have consistently arisen from this split-estate land issue: Does the BLM have the statutory authority to regulate how private surface owners use their property, and does the BLM have the authority to condition and regulate a federal mineral development, such as federal oil and gas leases. These two concerns have been addressed in the resolution of two resource management plan (RMP) protests in 1988 on split-estate lands (North Dakota RMP and Little Snake RMP) and two Washington Solicitor's Opinions (April 1 and 4, 1988). The conclusion states,

> In summary, while the BLM does not have the legal authority in split-estate situations to regulate how a surface owner manages his or her property, the agency does have the statutory authority to take reasonable measures to avoid or minimize adverse environmental impacts that may result from federally authorized mineral lease activity.

An example of the authority the BLM does have, is summarized in the January 7, 1992, Interior Board of Land Appeals (IBLA) Decision (122 IBLA 36, Glen Morgan, January 7, 1992), which states that "The operator of an oil and gas lease is responsible for reclamation of land leased for oil and gas purposes, even after expiration of the lease and even where the surface estate is privately owned. Such reclamation includes the restoration of any area within the lease boundaries disturbed by lease operations to the condition in which it was found prior to surface- disturbing activities." Another key point presented in this IBLA decision referenced the reservation of mineral reserves under section 9 of the SRHA. This section states that the United States reserves the "right to prospect for, mine, and remove the [reserved minerals]," which right encompasses "all purposes reasonable incident to the mining or removal of the coal or other minerals" (43 USC §299, 1988). As long interpreted by the U.S. Department of the Interior (USDI), such purposes include reclamation of the surface of the impacted land after mining is complete and the minerals are removed.

AUTHORITY

The Mineral Leasing Act of 1920

The Mineral Leasing Act (MLA), as amended (30 U.S.C. §§ 181-287), and its implementing regulations established the BLM's authority to lease and produce federal minerals. The restrictions identified through the planning process and attached to federal oil and gas leases constitute a legal contract between the lessee and the BLM. No other party can change that contract without the expressed consent of the authorized officer. The authorized officer may waive, modify, or amend lease conditions as site-specific analysis dictates.

The section of the MLA that specifically refers to the regulation of surface-disturbing activities on oil and gas-leased lands is found in 30 U.S.C. § 226(g), 1988. The key statement which does not distinguish between public surface and split-estate surface, but applies to all leases follows, "The Secretary of Interior, or for the National Forest lands, the Secretary of Agriculture, shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of the surface resources."

It has been cited that Onshore Oil and Gas Order #1 of 1983, "Approval of Operations on Onshore Federal Land and Indian Oil and Gas Leases," is the final resolution to the split-estate mineral issue. The order has sometimes been interpreted to mean that the BLM has waived all or many of its responsibilities during the development of federal oil and gas where split-estate lands is involved. The order does not rescind or revoke any of the laws or regulations including the MLA that inspired it. Furthermore, this order cannot revoke any other BLM responsibility or obligation specified elsewhere in laws or regulations, again including the MLA.

The following laws and executive orders are in addition to the MLA and pertain to split-estate federal mineral authorizations. They are not all-inclusive; new laws and amendments are passed frequently.

Federal Land Policy and Management Act of 1976

The BLM is responsible for both considering the impacts of its actions and approvals in land use planning, as well as for managing those impacts for public lands. Public land to be considered for split-estate land is the mineral interest and not the surface. The private surface is not public land; thus, it is not subject to the planning and management requirements of the FLPMA. The BLM has no authority over use of the surface by the surface owner. The BLM is required to declare how the federal mineral estate will be managed in the RMP, including identification of all appropriate lease stipulations (43 CFR 3101.1; BLM Manual Handbook, H-1624-1, IV.C.2). To be consistent with the requirements of the FLPMA, it is necessary to apply the same standards for environmental protection of split-estate lands as applied to the federal surface (BLM Manual 3101.91 B.1). The FLPMA also provides in Section 202 that the BLM "...shall provide for compliance with applicable pollution control laws, including state and federal air, water, noise, or other pollution standards of implemented plans." Many of these laws are addressed later in this document.

National Environmental Policy Act of 1969

The BLM's responsibilities for split-estate lands under the NEPA are basically the same as for federal surface. Even though the impacts will occur on private surface, the BLM is still responsible for considering alternatives or imposing protective measures since the impacts will be caused as a direct consequence of activities approved by the BLM and conducted pursuant to a federal action. Mitigation measures for impacts identified during the NEPA analysis may be imposed under the general authority set out in Sections 30 and 37 of the MLA of 1920 (30 U.S.C. §§ 187 and 193) and the policy of the FLPMA. Other statutes that could apply for taking reasonable measures to avoid or minimize adverse environmental impacts that may result from federally authorized mineral lease activities include the Clean Water Act (CWA) of 1977, the Clean Air Act (CAA), the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA) of 1973, and the Federal Onshore Control and Reclamation Act (FOCRA) of 1987. The FOCRA specifically requires the BLM to regulate surface disturbance and reclamation on all leases. With respect to offsite impacts, which also could include off-lease, off-unit, or off-the-original split-estate patent boundary, mitigation must be considered and met in order to approve a lease action, lands regardless of whether the surface is private or federal. The legal jurisdictional boundary (the lease

boundary) and access to such will be discussed in more detail later in this appendix under the heading "Access to Split-Estate Lands To Develop Federally Owned Minerals." Before leasing the mineral estate or approving lease development, the BLM determines whether that action would impact the quality of the human environment regardless of surface ownership. In this analysis, the BLM considers all impacts of the proposed action, whether those impacts are to surface resources, to use of the land by the surface owners, or to the subsurface. The BLM also takes into account the views of the surface owners and what impacts implementing the mitigation measures for lease activity would have on their uses of the surface.

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires the BLM to consider the impacts of its actions on historic properties and to seek comments from the State Historic Preservation Office (SHPO) and the Advisory Council on Historic Preservation (BLM Manual Section 8143.06). In fact, federal agencies are required to take into account the impact of any federally assisted or federally licensed undertaking on properties included on, or eligible for inclusion on, the National Register of Historic Places (NRHP). These responsibilities are the same on split-estate land as on public land (BLM Manual 3101.9). The 1992 amendments to the NHPA replaced the definition of "undertaking" in Section 301 of the Act as follows:

"Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including:

- Those carried out by or on behalf of the agency
- Those carried out with federal financial assistance
- Those requiring a federal permit, license, or approval
- Those subject to state and local regulation administered pursuant to a delegation or approval by a federal agency."

If activities to be conducted on split-estate lands under the terms and conditions of a federal oil and gas lease would result in adverse impacts to historic properties, the BLM has the authority to impose appropriate avoidance or mitigation measures. Currently, the BLM authorized officer consults with the SHPO to identify and evaluate historic properties that might be impacted, to assess impacts, and to determine satisfactory means for avoiding or mitigating adverse impacts. The Advisory Council on Historic Preservation is then given the opportunity to comment only if listed or eligible properties would be impacted. This process is explained in more detail in a current agreement among the Advisory Council, SHPO, and the BLM (regulation guidance is found in 36 CFR 800).

The BLM Manual 8100 (including the Wyoming manual supplements) contains guidance, policy, and the extent to which the BLM is responsible for split-estate land. It also indicates direction when access is denied to an operator or BLM personnel in determining impacts pursuant to the NHPA. Key points in the manual are that (1) any historic properties encountered belong to the landowner and if the landowner wishes, any cultural material removed from the property should be returned after study; (2) the authorized officer must consider alternatives if the landowner continues to refuse access for cultural resource work, including the feasibility of relocating the project; and, (3) the authorized officer also may consider approval or denial of the application without the cultural resource information. The other avenue for access is by way of the courts and is addressed under "Access to Develop Federally Owned Minerals."

Endangered Species Act of 1973

Section 7 of the Endangered Species Act (ESA) requires federal agencies, in consultation with the Secretary (currently delegated to the U.S. Fish and Wildlife Service [USFWS]), to ensure that no action authorized, funded, or carried out by an agency is likely to jeopardize the continued existence of a threatened or endangered species, whether plant or wildlife, or would result in the destruction or adverse modification of critical habitats. The ESA requirements apply to oil and gas leasing and operations on split-estate lands, just as they do to federal lands (Onshore Order No. 1; 43 CFR 3164.1).

A proposed surface-disturbing federally related action cannot and must not be approved until all applicable federal statutory requirements have been met.

OTHER STATUTES AND EXECUTIVE ORDERS

Clean Water Act of 1977, As Amended

The Federal Water Pollution Control Act Amendments of 1972, as amended in 1977, became commonly known as the Clean Water Act (CWA). The Act established the basic structure for regulating discharges of pollutants into the waters of the United States. It gave U.S. Environmental Policy Act (EPA) the authority to implement pollution control programs, such as setting wastewater standards for industry. The CWA also continued requirements to set water quality standards for all contaminants in surface waters. The Act made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions.

The CWA is the cornerstone of surface water quality protection in the United States. The statute employs a variety of regulatory and nonregulatory tools to sharply reduce direct pollutant discharges into waterways. These tools are employed to achieve the broader goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters so that they can support "the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water."

In accordance with recent revisions to Chapter 2 of the Wyoming Water Quality Rules and Regulations the state program name, the National Pollutant Discharge Elimination System (NPDES), has been changed to the Wyoming Pollutant Discharge Elimination System (WYPDES). This change clarifies that the Department of Environmental Quality (DEQ) is the permitting authority within Wyoming. However, NPDES permits will continue to be issued for pre-treatment discharges and within areas of the Wind River Reservation where the EPA remains the permitting authority.

In 1990 the EPA published regulations requiring all storm water discharges associated with industrial facilities to obtain storm water discharge permits. In Wyoming, where the DEQ is the permitting authority, Chapter 2, Section 6, of the Wyoming Water Quality Rules and Regulations requires permits for storm water discharges from all construction activities disturbing 1 or more acres. The type of facility being constructed does not change the requirement to obtain permit coverage. As such, construction of oil and gas facilities requires storm water permits in the State of Wyoming.

Section 404 of the CWA requires approval prior to discharging dredged or fill material into waters of the United States, including wetlands. Any person or entity (including federal, state, and local government agencies) planning to work in waters of the United States, or dump or place dredged or fill material in waters of the United States, must first obtain a permit from the Corps of Engineers. Other federal, state, and local statues also may require permits, licenses, variances, or similar authorization. Prior to issuing a

permit, the Corps must be presented with a certification from the state that the proposed project will not result in a violation of the state's water quality standards. This is referred to as a CWA Section 401 certification and is provided by the Wyoming DEQ, Water Quality Division.

Further information on the CWA can be accessed at the following two web sites:

- http://deq.state.wy.us/wqd/
- http://www.epa.gov/region5/water/cwa.htm.

Clean Air Act of 1955, As Amended

The Clean Air Act (CAA) states that the BLM and its permitted actions must comply with national and state air quality standards. The CAA also directs the BLM to cooperate with states in carrying out their implemented plans. The Act further provides for the prevention of deterioration of air quality and places responsibility on the BLM for the protection and, in certain cases, the enhancement of air quality and air-related values, including visibility.

Executive Order 11988 of 1977, "Floodplain Management"

This Executive Order (EO) states that "direct or indirect support of floodplain development must be avoided whenever there is a practical alternative." The BLM Manual 7221 states that "Long and short-term adverse impacts on natural and beneficial floodplains functions associated with the use and modification of floodplains must be avoided, to the extent possible; and actions causing definable adverse impacts (long or short-term) to the natural and beneficial floodplain functions must include protection, minimization of damage, restoration, and preservation measures." The 1979 manual guidance is somewhat outdated, as it refers to unit resource analysis (URA), a management framework plan (MFP), and some BLM planning and environmental assessment guidance more recently updated, but the basic processes and guidance are still applicable. The resource area plans do not contain floodplain identification. The guidance refers to the appropriate official (BLM hydrologist) to identify the base (100-year chance of a flood) and (or) critical (500-year chance of a flood) floodplain in relation to the location of the proposed action. This identification must extend upstream and downstream beyond the boundaries of the proposed action far enough to permit an analysis of the impacts that the proposal may have on the floodplain functions beyond the project boundary. Also, the public must be afforded an opportunity to be involved in the decisionmaking process for all actions within a floodplain or that may impact it. The difference in restrictions for addressing proposed actions within base versus critical floodplains is somewhat lacking. However, for actions within base floodplains, the BLM will make a determination whether the proposed action will be located there. In critical floodplains, only critical actions will be identified and analyzed according to the BLM environmental assessment process. Oil and gas activity, especially that which involves major surface-disturbing activity, qualifies as critical action and should be assessed appropriately within a critical floodplain. The guidance does not state that the BLM cannot authorize actions within floodplains, but it does state that mitigation and restoration measures must be completed for each alternative considered.

Executive Order 11990 of 1977, "Protection of Wetlands"

This Executive Order (EO) directs federal agencies to take action to minimize the destruction, loss, or degradation of wetlands. All federally initiated, financed, or permitted construction projects in wetlands must include all practical measures to minimize adverse impacts. Section 404 of the CWA (discussed above) is one of the permit processes to protect or minimize adverse impacts to wetlands.

Eagle Protection Act of 1940

This act prohibits persons from taking any golden or bald eagles or nests of such birds. Taking, as defined under this statute, includes molesting or disturbing. Violation of the prohibition in 16 U.S.C.§§ 668-668d is a criminal violation, regardless of where the activity occurs, whether on public land, National Forest lands, or private-lands.

Resource Conservation and Recovery Act of 1976, As Amended

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 as an amendment to the Solid Waste Disposal Act. The primary objectives of RCRA are to protect human health and the environment and to conserve valuable material and energy resources. The most important aspect of RCRA is its establishment of "cradle-to-grave" management and tracking of hazardous waste, from generator to transporter to treatment, storage, and disposal. Other aspects of RCRA include the development of solid waste management plans, prohibition of open dumping, encouragement of recycling, reuse and treatment of hazardous wastes, and establishment of guidelines for solid waste management. Generally, E&P exempt wastes are generated in primary field operations and not as a result of transportation or maintenance activities. When listed nonexempt and exempt wastes are mixed, the entire mixture could be considered a hazardous waste. For example, discarding a half-empty listed solvent into a reserve pit could cause the otherwise exempt reserve pit contents to become a hazardous waste. This may result in closure of a reserve pit under RCRA hazardous wastes regulations.

The amendment to RCRA also mandated the EPA to study exploration and production (E&P) wastes and recommend appropriate regulatory action to Congress. The EPA conducted the study and submitted a Report to Congress on December 28, 1987. This regulatory determination was made public on June 30, 1988. A key portion of this determination follows:

"The Agency plans a three-pronged approach toward filling gaps in existing state and federal regulatory programs by:

1. Improving federal programs under existing authorities in Subtitle D of RCRA, the Clean Water Act, and the Safe Drinking Water Act;
2. Working with states to encourage changes in their regulations and enforcement to improve some programs; and,
3. Working with Congress to develop any additional statutory authority that may be required."

Some of the reasons put forth by the EPA for this determination follow:

- "Subtitle C does not provide sufficient flexibility to consider the costs and avoid the serious economic impacts that regulation would create for the industry's exploration and production operations;
- Existing state and federal regulatory programs are generally adequate for controlling oil, gas, and geothermal wastes. Regulatory gaps in the Clean Water Act, and Underground Injection Control (UIC) program are already being addressed, and the remaining gaps in state and federal regulatory programs can be effectively addressed by formulating requirements under Subtitle D of RCRA and by working with the states; and
- It is impractical and inefficient to implement Subtitle C for all or some of these wastes because permitting burden that the regulatory agencies would incur if even a small percentage of these sites were considered Treatment, Storage, and Disposal Facilities (TSDFs) (53 FR 25456, July 6, 1988)."

The Interstate Oil and Gas Compact Commission (IOGCC) is an organization that includes governors of the 29 oil- and gas-producing states. The IOGCC has been assisting states in developing their oil and gas regulatory programs since 1935. In January 1989, the IOGCC formed a council on regulatory needs to assist the EPA in its three-pronged approach to fill the gaps in regulations. This council comprises of 12 state regulatory agency members and is supported by a 9-member advisory committee made up of representatives from state regulatory agencies, industry, and public interest and environmental groups. This council also is assisted by representatives from the EPA, the U.S. Department of Energy (DOE), and the BLM, all of whom act as official observers.

The purpose of the IOGCC council is to recommend effective regulations, guidelines, and standards for state-level management of E&P wastes. It is not intended to form the sole basis for any future federal statutory or regulatory authorities that may be sought by the EPA for E&P wastes. In 1990, the IOGCC adopted guidelines in the form of technical and administrative criteria recommended by the council and advisory committee. This publication, *EPA/IOGCC Study of State Regulation of Oil and Gas Exploration and Production Wastes* commonly is known as the "IOGCC Guidelines" or the "Green Book." These guidelines were updated in May 1994 with a revised publication titled *IOGCC Environmental Guidelines for State Oil & Gas Regulatory Programs.*

The USDI has the following fundamental principles of waste management:

"Wherever feasible, we will seek to **prevent** the generation and acquisition of hazardous wastes; where waste generation is unavoidable, we will work to **reduce** the amounts (toxicity or risk) generated through the use of sound waste management practices; we will **manage** waste materials responsibly in order to protect not only the natural resources entrusted to us, but the many people who live and work on our public lands, and the millions more who enjoy our lands and facilities each year; we will move aggressively to **clean up and restore** areas under our care that are contaminated by pollution."

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, As Amended

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. § 9601) is a public law (P.L. 96-105, as amended through P.L. 107-377) enacted by Congress in 1980 to facilitate the cleanup of sites where there had been a release or the threat of release of hazardous substances. The law was amended substantially in 1986 with the enactment of the Superfund Amendments and Reauthorization Act (SARA). The primary purpose of SARA is to expedite the pace of CERCLA response actions and cleanups.

Section 104 of CERCLA provides broad federal authority to respond directly to such releases or threat of release of hazardous substances that present "…an imminent and substantial endangerment…" to the public health or welfare or the environment, and to hold liable those parties responsible and to recover response costs from them.

The National Contingency Plan (NCP), CERCLA Section 105, establishes the processes and procedures that must be used by lead agencies in responding to releases of hazardous substances pursuant to CERCLA. The lead agency directs and facilitates activities related to a site, often including enforcement actions. When applying CERCLA authority, the lead agency must follow the requirements of the NCP. When responding to a hazardous substance release, the on-scene coordinator/remedial project manager should follow the processes and procedures of CERCLA and the NCP. Land management agencies,

including the USDI, are recognized in 40 CFR 300.5 as the "lead agency" under CERCLA for removal and remedial actions.

ACCESS TO SPLIT-ESTATE LANDS TO DEVELOP FEDERALLY OWNED MINERALS

Any mineral lessee, mining claimant, or operator (i.e., any person who has acquired from the United States the mineral deposits in such land) may enter and occupy as much of the private surface (patented) as may be required for the purpose of prospecting for, mining, or removal of minerals upon completion of any one of the following options (43 CFR 3814, 1994):

1. "Upon securing a written consent or waiver of the surface owner(s) for lands covered by the federal lease and (or) access to such lease over patented lands covered by the SRHA or HA estate or a single estate unified from several parcels originally patented under the above subject acts.
2. Upon payment of damages for crops, tangible improvements, and the value of the land for grazing purposes to the owner of the lands referenced in (1) above.
3. Upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the owner of the land referenced in (1) above, and to secure the payment of such damages for the crops, tangible improvements and the value of the land for grazing purposes of the owner as may be determined and fixed in an action brought upon the land or undertaken in a court of competent jurisdiction against the principles and sureties thereon."

For options one and two mentioned above, the BLM will require, at a minimum, a signed statement from the approved operator representative or the landowner that the operator or lessee and the landowner have reached an agreement for surface-disturbance damages. The BLM also may require the operator or lessee to furnish any additional agreement with the surface owner for the protection of surface resources and the reclamation of disturbed areas for incorporation into conditions of approval for authorizing the action. If the agreement is not deemed adequate to protect both onsite and offsite damage to the lands, additional measures and mitigation will be required. If an agreement is not reached, then the method according to option 3 must be followed. Under this method, a good and sufficient bond for not less than $1,000 according to 43 CFR 3814, must be posted by the lessee or operator payable to the United States for damages, specifically for crops, tangible improvements, and the value of the land for grazing purposes. This surface-owner bond is separate and not part of the bond obligations for leases under 43 CFR 3104. According to the procedures for this option, the lessee/operator must serve this bond on the impacted landowner; along with notification of their rights to object to the sufficiency of the bond in accordance with the procedure under 43 CFR 3814, and serve proof to the appropriate BLM office that they have done so. This then prompts the BLM authorized officer to independently notify the surface owner(s) in writing of their rights under the procedures regarding protests and appeals to the sufficiency of the bond. The protest period runs for 30 days from date of service of the bond and rights to protest and appeal the bond.

The emphasis in this section is on access to federal minerals within SRHA and HA patented land. This process for access also pertains to patents with the minerals reserved to the United States issued pursuant to Section 203 (sales) and Section 206 (exchanges) of the FLPMA.

The right to access an oil and gas lease includes all the land within the original patent where the minerals were reserved to the United States, even if that land is not within the lease. If an oil company wishes to cross one portion of a patent that has been subdivided into two portions to drill in the other portion, they have that right. In *Kinney Coastal Oil Co. v. Kieffer*, 277 US 488, 544 (1928), Coastal Oil, who held a

federal oil and gas lease, sued the surface owner for subdividing the surface and erecting buildings for a town. The Supreme Court agreed with the oil company and ruled to prevent the use of the area as a commercial or residential area. Thus, the mineral owner's dominant servitude applies anywhere within the limits of the original patent no matter how far or often the surface estate has been subdivided. In another landmark case, *Mountain Fuel Supply Co. v. Smith,* 471 F. 2d (10th Cir. 1973), an oil company wished to cross 10 parcels to drill a well on the 11th parcel. All of the parcels had been patented at different times to different parties. At a later date, the defendant in the case had obtained all of these parcels. The court made no less than three important holdings in this case. One, if the parcels had remained separately owned, the oil company would **not** have access rights across the 10 parcels to drill a well on the 11th; however, the company does have access rights on the 11th parcel on which they were to drill their well (471 F. 2d at 596,597). Two, where the surface ownership of all the parcels had been unified under a single ownership, the oil company would indeed have access across all the parcels (471 F. 2d at 597). Three, the approved unitization of the area by the appropriate authority was simply irrelevant (471 F. 2d at 597). The lessees were restricted to the development of their leases, or, if appropriate, within a unit. The SRHA or HA access rights to develop federal mineral lands are dictated by the patented surface or a combination of patents unified by a single owner.

Following are four decision options that may evolve during the protest period.

1. If no objections are received from the landowner within the protest period, the authorized officer will issue and serve a final decision of approval of the sufficient bond coverage to the landowner with a copy going to the lessee or operator. The lessee or operator can then enter onto the surface of the patented land(s) impacted by the lease, provided all applicable federal and state laws are met.
2. If the surface owner files a protest (objection) to the bond within the protest period, the authorized officer will review the bond coverage, accompanying papers, and objections to determine whether the bond should be approved or disapproved. If the bond is disapproved, a decision will be served on the lessee/operator with a copy going to the landowner. The lessee or operator will have 30 days to appeal to the Director of the BLM. Some of these cases have been appealed to the Interior Board of Land Appeals (IBLA); however, this is not the process according to the regulations contained in 43 CFR 3814. If the bond is approved, the decision will be served to the surface owner with a copy going to the lessee or operator. The application for permit to drill (APD) on Sundry Notice will be approved concurrently with the bond approval decision; the lessee or operator can then enter onto the land as specified above. The surface owner will be given 30 days to appeal the decision to the Director or the IBLA. If no appeal is filed, the authorized officer will serve a second final decision to the landowner approving the bond with no further right of appeal.
3. In no instances will lease action such as an APD be approved in the absence of the surface owner's consent without first satisfying the requirements of 43 CFR 3814. The purpose of these requirements is to ensure that the surface owners are treated fairly, and the mineral lessee or operators are allowed to enjoy the full privileges of their leases.

   In instances in which landowner demands become unreasonable or excessive, the lessee or operator is protected by 43 CFR 3814 regulations. Conversely, the BLM is assuring the landowners of the opportunity to protect themselves and ensure just compensation via the 43 CFR 3814 regulations.
4. If the landowner and lessee or operator cannot agree or settle on a payment for damages within the lifespan of the authorization(s), especially if the lease is to be abandoned, then the landowner

should take his/her action to a court of competent jurisdiction to secure payment of such damages. The lessee or operator also has the option to go to court to settle for payment of damages to the landowner. This may be true particularly if a lessee or landowner would want his or her bond released from any lease obligations, including termination. If an agreement cannot be reached for settlement for the payment of damages, either party may go to court at anytime in this above-mentioned process to have the court set the amount of damages, which are to be paid at that time. Another option that could be pursued by a lessee or operator for access to develop federal minerals is via state condemnation procedures.

Access to develop all federal minerals follow these procedures with the following exception; for federal coal reserved to the United States on split-estate lands, an agreement must be reached with the "qualified" landowner prior to developing federal coal. For a surface owner to be considered qualified, that person, persons, or corporation must (1) hold legal or equitable title to the surface of the split-estate lands; (2) have their principal place of residence on the land or personally conduct farming or ranching operations on the farm or ranch unit impacted by surface mining operations or receive a substantial portion of their income, if any, directly from such farming and ranching operations; and (3) have met the conditions of point 1 and 2 above for a period of not less than 3 years. If a surface owner has been found to be "unqualified," then access for development of the federal coal would follow the procedures of 43 CFR 3814 discussed above. Prior to posting a coal lease sale notice, the BLM requires the consent of all surface owners who meet the criteria of a 'qualified surface owner' and whose lands overlie coal deposits to determined a preference for or against mining by other than underground mining techniques (43 CFR 3427).

The SRHA was amended on April 16, 1993, Public law 103-23a. The amendment to the Act requires special procedures that must be complied with by individuals or companies prior to locating mining claims on land where the surface is patented and the minerals are reserved under the SRHA. A key change that came about from this amendment that pertains only to locatable minerals is that if the operations are located on lands patented under the SRHA and the claimant does not have written consent from the surface owner, then the claimant or operator must submit a plan of operation and obtain BLM approval. Where the surface owner has signed a consent agreement, a plan of operation is not required by the BLM and the claimant does not need BLM approval to start operations on that land.

Mineral materials including sand and gravel underlying SRHA lands or lands exchanged under Section 8 of the Taylor Grazing Act of 1934 were retained to the United States in the original patents. Therefore, the unauthorized removal of sand, gravel, and other common variety minerals is considered a trespass. The use, however, of mineral materials from SRHA lands for improvement and maintenance of those same lands, is not to be considered a trespass (Watt v. Western Nuclear, Inc., 103 S. Ct. 2218, June 6, 1983). Generally, the owners of the surface estate where the federal government owns the mineral estate may use without the benefit of a sales contract or permit, minimal amounts of mineral material for personal use within the boundaries of the surface estate.

It is not the BLM's position to encourage the practice of payment of damages in lieu of restoration, nor does the BLM question the terms and dollar amounts under which an agreement is made. The BLM's position merely is to ensure that an agreement is reached that is acceptable to both parties. The BLM, however, does have the right according to the MLA to require additional surface reclamation measures on all lease actions, although they must be reasonable, justifiable, and in compliance with all pertinent laws. The goal should be to restore these areas disturbed by lease activities and operations to their original condition or to a reasonable environmentally sound condition. The surface owner should be compensated for all damages created by lease development.

Policy and Guidance for Authorizing Class II Injection Wells for Fluid Disposal Located on Split-Estate, Private Surface/Federal Minerals

If an oil and (or) gas well located within a federal oil and gas lease on split-estate land is converted to an injection well for disposing of off-lease, off-unit-produced fluids by either a third party or the current oil and gas lessee or operator, a rights-of-way (ROW) is **not** the appropriate authorization and will **cease** being the permitting instrument. This policy resulted from two key IBLA decisions pertaining to (1) the Mallon Oil Company (104 IBLA 145, September 2, 1988) and (2) the Phillips Petroleum Company (105 IBLA 345, November 17, 1988). The outcome from the Mallon Oil Company case was that once the minerals have been removed from the ground, the void formerly occupied by the minerals reverted to the surface owner. In this case, both the surface and minerals were owned by the United States, and the court upheld that an ROW issued by the BLM was the appropriate authorization. In the Phillips Petroleum Company case, which involved split-estate lands, the BLM did not have the authority to issue a permit for the disposal of salt water into a dry well located on private surface and federal minerals. In actuality, the BLM used the wrong authorization mechanism—a permit pursuant to Section 302(b) of the FLPMA—instead of an ROW under Section 501 of the FLPMA. However, the BLM was not the owner. According to the Mallon Oil Company case decision, the void space was the property of the surface owner. Henceforth, the federal mineral estate will be protected using the following guidelines and procedures.

Where BLM determines that there are federal minerals within the formation for injection of fluids, the appropriate authorization for fluid disposal on existing federal oil and gas leases on split-estate lands is by an approved Sundry Notice (Form 3160-5). These well activities will be the responsibility of the appropriate lessee or operator and **not** a third party. In considering and documenting feasibility for each case, the following factors must be analyzed, where applicable, in the applicant's proposal for subsequent well operation (Sundry Notice): (1) geology, (2) economic factors, (3) volume of produced fluids, (4) hydrology and hydrogeology, (5) land use plans, (6) availability of private, state, and other land disposal sites, (7) state and (or) federal agencies' permitting requirements (Onshore Oil and Gas Order #7, 1994), (8) water quality, (9) well bore schematics (present and (or) proposed), (10) monitoring requirements of down hole injection or disposal, and (11) other factors determined by the authorized officer. Not only the applicant, but even more importantly, the BLM must consider these factors before approving an authorization.

If the proposal is determined to be feasible and a Sundry Notice is the instrument of authorization, the following conditions and stipulations should be considered and included as part of the authorization:

1. A stipulation stating that "The disposal well authorization may be terminated by the authorized officer of the BLM by a decision notifying the approved lessee or operator thirty days (30) prior to the date of termination. Termination must be for cause which includes, but is not limited to, compliance with both the lease and specific Sundry Notice authorization stipulations and conditions as well as the protection of the federal mineral estate, and the laws and regulations that govern thereof."
2. An approved UIC permit issued by the Wyoming Oil and Gas Conservation Commission and written approval from the surface owner
3. Produced fluid disposed in a well traced to the specific oil and gas well(s) from which it came, and these specific well(s) so stated as part of the approved Sundry Notice.

Converting federal oil and gas oil wells within a federal lease on split-estate lands to Class I commercial injection wells (wells used to dispose of hazardous waste; 40 CFR 144.6, 1993) will **not** be authorized for fluid disposal into a formation containing federal minerals.

If the BLM determines that the off-lease, off-unit-produced fluids are to be disposed of by injection into a formation found to be totally void of federal minerals, the following conditions **must** be addressed before a well is approved for disposal purposes:

1. The lessee or operator must comply with all the appropriate regulations within 43 CFR 3160 (1994), and, more specifically, Section 3162.3-4, "Well Abandonment."
2. If used for disposal purposes, the BLM must consider that the well meet specific criteria, including (1) that appropriate steps be taken to avoid intermingling of fluids (oil, gas, and water) between formations or intervals that contain fluids of substantially different quality, and (2) protection of **all** federal minerals that may exist in other formations.
3. For an abandoned federal well to be used for subsurface disposal of off-lease or off-unit produced fluids into a formation depleted of federal minerals, a BLM release form must be properly filled out and signed by the private surface owner(s) and accepted by the BLM authorized officer. By signing this release form, the private surface owner acknowledges his or her potential future liability for disposal activities and ensures that the operation of the well is operated according to standards as required by appropriate federal and state regulatory agencies. With an approved release, the landowner also could ultimately assume the responsibility for the final plugging and reclamation requirements for the well. When the BLM accepts this release, the lessee's or operator's oil and gas bond also should be released for this well.

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